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IN THE UNITED STATES DISTRICT COURT, CENTRAL DIVISION
DISTRICT OF UTAH

UNIVERSITY OF UTAH, a body corporate and politic under Utah law, and J. BERNARD MACHEN, President of the University of Utah,	:	**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
Plaintiffs,	:	
v.	:	
MARK L. SHURTLEFF, Utah Attorney General,	:	Case No. 2:02-CV-0212-K
Defendant.	:	Judge Dale A. Kimball

Defendant Mark L. Shurtleff asks this Court to deny the plaintiffs' motion for summary judgment because: the plaintiffs do not have standing to bring this action, no case or controversy has been established between the parties, and this Court is without jurisdiction to consider the plaintiffs' state law claim. Further, the plaintiffs have failed to state a claim of violation of any right of theirs protected by the First Amendment to the United States Constitution. Finally, defendant asks this Court to dismiss the plaintiff's state law claims, as a matter of Utah law, on the merits.

STATEMENT OF UNDISPUTED RELEVANT FACTS

Generally, the defendant does not challenge the plaintiffs' undisputed facts so far as they state facts and not legal conclusions. Instead, as more fully articulated below, defendant submits that many of these facts are immaterial and irrelevant.

1. The University and the Campus

Defendant admits these facts and does not dispute them.

2. The University's Internal Policies Prohibiting Use and Possession of Firearms on Campus

Defendant admits the facts stated in these paragraphs (such as the existence of the University of Utah's internal policies concerning firearms) but disputes the legal conclusion stated that these policies are lawful and that they were enacted properly under authority granted to the University.

3. Support Among Members of the University Community for the Policy

Defendant does not dispute these facts, though he submits that they are irrelevant and immaterial.

4. Comparable Policies of Other Academic Institutions

Defendant does not dispute these facts, though he submits that they are irrelevant and immaterial.

5. The Attorney General's Opinion and Its Public Announcement

Defendant does not dispute the facts set forth in this section other than disputing those "facts" concerning the alleged "encouragement" that the defendants actions have given to others or that his conduct "triggered" the conduct of others. Memorandum in Support of Plaintiffs' Motion

for Summary Judgment at xii-xiii. These "facts" are based not upon knowledge of the affiant (President Machen), but upon his "beliefs." Affidavit of J. Bernard Machen at ¶ 18.

6. The Danger of Firearms on Campus

Defendant admits that these paragraphs contain the opinions of the affiants. Defendant submits that these opinions are irrelevant and immaterial.

7. Administration of Utah's Concealed Weapons Law

Defendant does not dispute these facts, though he submits that they are irrelevant and immaterial.

STANDARD FOR CONSIDERATION

A trial court's decision as to whether or not it has subject matter jurisdiction is a question of law. Elephant Butte Irrigation Dist. v. Dep't of Interior, 160 F.3d 602, 607 (10th Cir. 1998). Granting a summary judgment motion is "appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " Kingsford v. Salt Lake City Sch. Dist., 247 F.3d 1123, 1128 (10th Cir. 2001).

SUMMARY OF ARGUMENT

This Court does not have jurisdiction to consider the plaintiffs' claims. Their federal claims are brought under the first amendment as it is made applicable to the states by the fourteenth amendment. But long standing precedent prohibits a state created entity, such as the University of Utah, from bringing claims under the fourteenth amendment against the state and its officers. Nor does this Court have jurisdiction to consider the plaintiffs' state law claims against a state officer.

The plaintiffs do not have standing to bring this action. The only action that Attorney General Shurtleff is alleged to have performed is the issuance of a non-binding opinion to the leadership of the Utah Legislature. Plaintiffs do not even allege that the defendant has made any threat of prosecution against them. The only conduct of the defendant is that he has beliefs as to what the law of Utah is and has made those public. The plaintiffs have made no showing that they have suffered any concrete and particularized injury at the hands of the defendant. There is no causal connection between Attorney General Shurtleff and the complained of actions of third persons not before the Court. Further, no relief granted against the defendant would be likely to redress the concerns of the plaintiffs. For these further reasons, the Court is without jurisdiction over the plaintiffs' complaint.

The University of Utah does not have any first amendment rights that could be violated by the defendant. Nor can the plaintiffs, as a state entity and a state officer, sue another state officer for alleged violations of any rights pursuant to the fourteenth amendment.

Plaintiffs' state law claims should also be dismissed for failure to state a claim for relief. The University of Utah and President Machen claim that the university is independent and autonomous of state control as a matter of state law. This claim has been repeatedly rejected by the Utah Supreme Court for over ninety years. This Court and the United States Circuit Court of Appeals for the Tenth Circuit have also recognized that the University of Utah is subject to the control of the state and its legislature. Utah's legislature has retained for itself the power to regulate firearms and expressly prohibited political subdivisions and state entities from enacting any rules pertaining to firearms without first receiving specific authorization from the legislature. The University of Utah

has not received any such specific authorization. Its firearms policies are therefore invalid as a matter of state law.

ARGUMENT

The central core of this lawsuit is a difference of belief between the plaintiffs and Attorney General Mark L. Shurtleff as to the correct interpretation of Utah's firearms laws.

The University of Utah and President Machen state two causes of action in their complaint. First, they claim that their first amendment rights have or will be violated, as made applicable to the state by the fourteenth amendment. This claim is alleged to be brought under "the terms of 42 U.S.C. § 1983." Complaint at 3, ¶ 6. Second they claim that the University's state constitutional right to govern itself independent of the Utah Legislature has also been violated. For the following reasons, Attorney General Shurtleff asks this Court to dismiss this matter for lack of jurisdiction, and on the merits.

Plaintiffs have failed to identify if they are suing Attorney General Shurtleff in his official capacity or in his personal capacity. An official capacity action is a way of pleading a claim against the entity of which the defendant is an officer. Kentucky v. Graham, 473 U.S. 159, 165 (1985). While personal capacity suits seek to impose individual liability upon a government officer. Hafer v. Melo, 502 U.S. 21, 25 (1991). Because the plaintiffs seek only injunctive and declaratory relief against Attorney General Shurtleff, it would appear that this action has been brought against the defendant in his official-capacity. "However, the individual defendants named in this action can be sued for damages under § 1983 in their individual capacities. Also, to the extent plaintiff is seeking

injunctive relief, he may sue the individual defendants in their official capacities." Roach v. Univ. of Utah, 968 F.Supp. 14446, 1451 (D. Utah 1997).

I. PLAINTIFFS ARE WITHOUT STANDING TO BRING THIS ACTION

The University of Utah and President Machen brought this action against Attorney General Shurtleff. Yet the only conduct that they allege against the defendant is that he issued an opinion to the Utah State Legislature and has expressed, publicly, his opinion on a matter of Utah law. He is sued simply because the plaintiffs hold a different view as to what the law of Utah is. Plaintiffs do not allege any other conduct on the part of the defendant. Instead the plaintiffs claim that Attorney General Shurtleff's public statements have "encouraged" others to disagree with the plaintiffs views as to what the law of Utah concerning firearms is. There is no allegation that Attorney General Shurtleff has threatened the plaintiffs, or anyone else, with prosecution under any law. Indeed, the plaintiffs have failed to identify under what criminal statute they are in fear of being prosecuted.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> The party invoking federal jurisdiction bears the burden of establishing these elements.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and footnote omitted).

The plaintiffs have failed to meet any of these essential elements of standing. Standing is a jurisdictional prerequisite. Phelps v. Hamilton, 122 F.3d 1309, 1316 (10th Cir. 1997). Because the plaintiffs have failed to allege facts that show this Court has jurisdiction, this matter should be dismissed without prejudice. Defendant incorporates by reference the argument from his motion for judgment on the pleadings as to how the plaintiffs have failed to meet any one of these elements of the test for standing.

In claiming that they have standing, plaintiffs rely on Pierce v. Society of Sisters, 268 U.S. 510 (1925) and other cases in which first amendment standing was conferred upon individuals who had been threatened with prosecution without requiring that they await the actual prosecution before seeking federal relief. Id. at 533. But these cases are not relevant. Plaintiffs have not shown that they have been threatened with any form of prosecution by the defendant. Instead, plaintiffs would have this Court determine that a public official can be sued simply because his public statements concerning the state of the law are contrary to the beliefs of the perspective plaintiff. Such a broad definition of standing would actually have an inappropriate "chilling effect" on the free speech of government officials. State officers would be hesitant to speak out on issues of public concern for fear that their expression of an opinion could lead to litigation.

The fact that an Attorney General issues a formal opinion does not create standing, even if the plaintiffs complain of the actions of third-persons who support their conduct by reference to the Attorney General's opinion. In 1st Westco Corp. v. Sch. Dist. Of Philadelphia, 6 F.3d 108, 113-15 (3rd Cir. 1993) (Attorney General could not be sued for issuance of non-binding opinion), the court rejected the idea that a high state official could be liable for simply giving non-binding legal advice

in the form of an opinion. Where the Pennsylvania Attorney General had not threatened any prosecution, his issuance of an opinion to an interested third-person did not subject him to liability.

The same result was reached in Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437, 441 (7th Cir. 1992) ("Plaintiffs apparently named the office of the Attorney General in an effort to obtain a judgment binding the State of Illinois as an entity, a step that Congress did not authorize when enacting 42 U.S.C. § 1983 and that the eleventh amendment does not permit in the absence of such authorization"). The court held that an Attorney General who had not threatened the plaintiffs with prosecution could not be sued and had to be dismissed. This is especially significant because the court went on, against appropriate defendants, and granted relief.

The plaintiffs have failed in their burden to demonstrate that they have standing to bring this action in this Court and the same should therefore be dismissed.

II. THE UNIVERSITY OF UTAH, AND IT PRESIDENT, DO NOT HAVE A RIGHT TO SUE THE DEFENDANT FOR ALLEGED VIOLATIONS OF FIRST AND FOURTEENTH AMENDMENT RIGHTS

Plaintiffs allege that any legislative control over the University's firearms policy would violate their rights to academic freedom under the First Amendment. Memo. in support of plaintiffs' motion for summary judgment at 3-9. Defendant submits that this argument errs in that it seeks to place a state institution's belief as to what makes good public policy as a constitutional prohibition against the state legislature's ability to determine what the state's public policy shall be.

Plaintiffs fail to state a claim because government can control its own expression and that of its agents, as opposed to private expression, without violating First Amendment rights.

> The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents. Consequently, the Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen.

Serra v. United States Gen. Serv. Admin., 847 F.2d 1045, 1048-49 (2nd Cir. 1988) (citations and internal quotations omitted); Wells v. City and County of Denver, 257 F.3d 1132, 1139 (10th Cir. 2001) (government within its rights to control content of its own speech); Housing Auth. of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183, 1188 (10th Cir. 1991) (rights guaranteed by fourteenth amendment are private rights).

As more fully argued in the memorandum in support of defendant's motion for judgment on the pleadings (at 12-15, 22-24), the plaintiffs, as a state entity and state officer, have no first amendment rights that can be exerted against the state and its officers. The cases relied upon by the plaintiffs are inapposite. They deal with suits brought by students or employees who assert their private constitutional rights in challenges to university policies. None of them stand for the proposition that a state institution's "academic freedom" permits it to disregard the laws and public policies established by the legislature of the state that owns it. None of them assert that a state university, in the interest of "academic freedom," has the constitutional right to disregard the laws of the state that created and controls it. "Deferring to the judgment of educators"[1] does not arise to a constitutional right by a state agency to assert its independence from state control.

Plaintiffs cite Gardenhire v. Chalmers 326 F.Supp. 1200, 1204-5 (D. Kan. 1971) for the proposition that a public university may have a duty to prevent guns from being brought on campus.

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[1] Axson-Flynn v. Johnson, 151 F. Supp.2d 1326, 1339 (D.Utah 2001)

But the facts of Gardenshire demonstrate how inapplicable that decision is. The court there indicated that a university might have a duty to prevent a student from coming on campus who had been charged with illegally carrying a concealed weapon and attempting to murder a fellow student. The court's decision does not address in any manner whether the United States Constitution mandates that public universities follow the policy championed by the University of Utah as opposed to that established by Utah's Legislature.

The plaintiffs have failed to state a claim for relief under the federal constitution and their federal claims should therefore be dismissed with prejudice.

III. UNDER UTAH LAW, THE UNIVERSITY OF UTAH IS NEITHER SELF-GOVERNING NOR AUTONOMOUS

The University of Utah's claims to autonomy, permitting it to create its own firearms policy, have been rejected repeatedly by the courts of Utah, the Tenth Circuit and this Court as shown in the memorandum in support of defendant's motion for judgment on the pleadings at 24-28. It is significant that the law of Utah at the time the state's constitution was adopted expressly stated that the University of Utah was "subject to the laws of Utah, from time to time enacted, relating to its purposes and government." 1892 Utah Laws 8. Far from granting any form of autonomy to the University, Utah's Constitution simply continued the rights and privileges already provided by statute. This included the continuing requirement that the University be subject to the laws of Utah from time to time enacted.

Under Utah law it is "indicated in unequivocal terms that the University acts as a state-created, state-financed entity with a severely constricted degree of autonomy." Pharmaceutical and

Diagnostic Services, Inc. v. University of Utah, 801 F.Supp. 508, 512 (D. Utah 1990) (footnote omitted). For this reason the plaintiffs' motion for summary judgment should be denied and their state law claims should be dismissed on the merits.

IV. THE UNIVERSITY OF UTAH'S FIREARMS POLICIES ARE CONTRARY TO UTAH LAW

In interpreting statutory language, the Utah Supreme Court has explained:

> First, our primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve. We need look beyond the plain language only if we find some ambiguity. "In analyzing a statute's plain language, we must attempt to give each part of the provision a relevant and independent meaning so as to give effect to all of its terms." However, if we find a provision that causes doubt or uncertainty in its application, we must "analyze the act in its entirety and 'harmonize its provisions in accordance with the legislative intent and purpose.'" Nevertheless, a statute's unambiguous language "may not be interpreted to contradict its plain meaning."

State v. Burns, 2000 UT 56, ¶ 25, 4 P.3d 795 (citations omitted).

The plain meaning of Utah's laws concerning firearms is clear from a statute that the plaintiffs failed to address. "[A]ll authority to regulate firearms is reserved to the state through the Legislature." Utah Code Ann. § 78-27-64(1) (Supp. 2001). Indeed, the statute's title is "Regulation of firearms reserved to state." This is not a criminal statute, so the plaintiffs err when they claim that Utah's Legislature has only retained to itself the authority over creating criminal statutes concerning firearms. Instead this statute is found in the miscellaneous provisions chapter of Utah's Judicial Code which it shares with numerous other provisions that are clearly civil in nature. The plain and unambiguous language of this statute reserves all authority to regulate firearms to the Utah Legislature.

Attorney General Shurtleff's legal opinion correctly stated that the University of Utah's firearms policies are invalid because they have not been authorized by the legislature. Absent an express grant of authority from the Utah State Legislature, the University of Utah is without the power to regulate firearms. Any policy it enacts or seeks to enforce on this issue is invalid and without effect. Only the uniformly applicable laws enacted by the Utah State Legislature regulate if, when or how firearms may be introduced onto the campus of the University of Utah.

The plaintiffs also fail to account for the most appropriate evidence, outside the actual language of the statute, that demonstrates that the Utah Legislature intended that the University of Utah not be permitted to create its own firearms policies. In their complaint, they admit that the Utah State Legislature enacted Senate Bill 170, reauthorizing administrative rules, which expressly stated that it was not reauthorizing the University of Utah's internal university firearms policy. Complaint at 8-9 ¶ 27(a). Without consideration of whether this enactment was effective in overturning the University's firearms policy, it clearly demonstrates the intention of not just one or two legislators, but of the Legislature as a whole. Defendant submits that the plain intent of the Legislature of the State of Utah is that the University of Utah not be authorized to enact its own firearms policy. For this reason the plaintiffs' state law claims should be dismissed on the merits.

CONCLUSION

For the reasons stated above, defendant Mark Shurtleff, Attorney General of the State of Utah asks this Court to deny the plaintiffs' motion for summary judgment. Instead, this action should be dismissed for lack of jurisdiction. In the alternative, defendant asks that this matter be dismissed because the plaintiffs have failed to state a claim upon which relief can be granted.

DATED this _____ day of August, 2002.

_____
BRENT A. BURNETT
Attorney for Defendant Mark L. Shurtleff

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of August, 2002, a true, correct and complete copy of the foregoing was delivered to the following attorneys as indicated below:

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